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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 KEVIN LEE FRANCOIS, ) CASE NO. SACV 12-988-AG (PJW)  
11 Plaintiff, )  
12 v. ) FINAL REPORT AND RECOMMENDATION  
13 TROY ZEEMAN, et al., ) RE: DEFENDANTS' MOTION TO DISMISS  
14 Defendants. ) PLAINTIFF'S FIRST AMENDED  
15 ) COMPLAINT

16 This Final Report and Recommendation is submitted to the Hon.  
17 Andrew J. Guilford, United States District Judge, pursuant to 28  
18 U.S.C. § 636 and General Order 05-07 of the United States District  
19 Court for the Central District of California. For the reasons  
20 discussed below, it is recommended that Defendants' motion to dismiss  
21 the First Amended Complaint ("FAC") be granted in part and denied in  
22 part.<sup>1</sup>

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27 <sup>1</sup> This Final Report and Recommendation has been issued to  
28 address arguments raised by the parties in their Objections to the  
original Report and Recommendation. (Doc. Nos. 76-79.) Because the  
Court's ultimate decision remains unchanged, the parties have not been  
given an opportunity to file additional objections.

## I.

## SUMMARY OF FACTS

On January 5, 2010, Plaintiff Kevin Lee Francois was walking in a breeze-way on 42nd Street in Newport Beach, California, when he heard a woman tell him to "come here." (FAC at 6.<sup>2</sup>) Plaintiff turned to move out of the breeze-way and started running when he heard her say, "I'll shoot you." (FAC at 6.) Plaintiff then dropped to the ground and a female police officer, according to Plaintiff, Defendant Officer Gamble, jumped on his back and sprayed him in his eyes with pepper spray. (FAC at 6.) Plaintiff was rendered temporarily blind by the pepper spray.

A short time later, Defendant Officer Zeeman arrived, jumped on Plaintiff's back, and handcuffed him. (FAC at 6.) While he was being handcuffed, Plaintiff received a small cut on his forehead. (FAC at 8.) Plaintiff complains that neither Gamble nor Zeeman ever identified themselves as police officers. (FAC at 6.)

Thereafter, Officer Zeeman radioed for back-up and medical assistance. (FAC at 8.) Officer Jarema arrived at the scene and drove Plaintiff to the police station for booking. (FAC at 23-24.) Later, when Plaintiff received the arrest report, it listed Officer Zeeman as the arresting officer, not Officer Gamble. (FAC at 6.)

Following his arrest, police took a DNA sample from him. Plaintiff's DNA matched DNA from a sexual assault case in Arizona and he was eventually sent to Arizona to stand trial for sexual assault. (See Doc. No. 19, Exh. 4 at 2.) Plaintiff attempted to gather

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<sup>2</sup> To avoid confusion, the Court has used the page numbers assigned to the FAC by the electronic filing and docketing system.

1 information about his arrest in Newport Beach in an effort to suppress  
2 the DNA evidence in the Arizona case. Plaintiff claims that several  
3 employees of the Newport Beach Police Department perjured themselves  
4 during his investigation. According to Plaintiff, on September 28,  
5 2010, Gabrielle Monzingo, a community services officer for the Newport  
6 Beach Police Department, perjured herself in a memorandum when she  
7 claimed that Officer Gamble was not involved in Plaintiff's arrest.  
8 (FAC at 29; FAC Exh. A.) Plaintiff also alleges that Sergeant Joe  
9 Cartwright of the Newport Beach Police Department perjured himself on  
10 June 12, 2013, when he made false statements in a declaration  
11 regarding Officer Gamble's police car. (FAC at 25-26, 29-30.)  
12 Plaintiff claims that Susan Meade, a supervisor at the Newport Beach  
13 Police Department, perjured herself when she submitted a declaration  
14 about dashcam videos on June 13, 2013. (FAC at 26.) He claims Wendy  
15 Koudelka, a supervisor at the Newport Beach Police Department,  
16 perjured herself on June 18, 2013, when she fabricated police records  
17 and explained incorrectly how to decode them. (FAC at 26-27.)

## 18 II.

### 19 ANALYSIS

20 Plaintiff brings this civil rights action under 42 U.S.C. § 1983  
21 against seven Newport Beach Police Department employees and the City  
22 of Newport Beach. He alleges that Officers Gamble, Zeeman, and Jarema  
23 violated his Fourth and Fourteenth Amendment rights when they arrested  
24 him without probable cause, used excessive force during his arrest,  
25 falsified a police report, and conspired to conceal their uncon-  
26 titutional acts by lying about what they had done. He also complains  
27 that Wendy Koudelka, Gabrielle Monzingo, Susan Meade, and Sergeant  
28 Cartwright violated his Fourteenth Amendment rights when they perjured

1 themselves in sworn declarations. He sues the City of Newport Beach,  
2 alleging that it too violated his constitutional rights because it  
3 knew about the officer's illegal and unconstitutional behavior and  
4 failed to act, thus joining the conspiracy against Plaintiff.

5 Defendants move to dismiss the case, arguing, among other things,  
6 that Plaintiff has failed to state a claim upon which relief can be  
7 granted and that his claims are *Heck* barred. (Doc. No. 17.) They  
8 point out that Plaintiff previously filed an identical case that was  
9 dismissed at the screening stage. See *Kevin Lee Francois v. Officer*  
10 *Zeeman, et. al.*, SACV 12-0046 (C.D. Cal.).<sup>3</sup> For the reasons explained  
11 below, the motion is granted in part and denied in part.

12 A. Standard of Review

13 Under Federal Rule of Civil Procedure 12(b)(6), a defendant is  
14 entitled to a dismissal of an action if a complaint lacks a legal  
15 theory or alleges insufficient facts to support a legal claim. To  
16 survive a motion to dismiss, the complaint must contain sufficient  
17 facts to state a claim that is plausible on its face. *Ashcroft v.*  
18 *Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible if the facts  
19 alleged in it and the reasonable inferences that can be drawn from  
20 those facts demonstrate that the defendant is legally liable for the  
21 misconduct alleged. *Id.*

22 In reviewing a motion to dismiss, the Court accepts as true the  
23 factual allegations contained in the complaint and views all

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25 <sup>3</sup> On January 10, 2012, Plaintiff filed a Complaint, alleging  
26 similar facts and civil rights violations along with a request to  
27 proceed *in forma pauperis*. The Court denied Plaintiff's *in forma*  
28 *pauperis* request and, in a lengthy order, concluded that the Complaint  
was subject to dismissal for failure to state a claim upon which  
relief could be granted. The Court informed Plaintiff that he could  
resubmit the Complaint if he cured certain deficiencies.

1 inferences in a light most favorable to the plaintiff. *See Erickson*  
 2 *v. Pardus*, 551 U.S. 89, 94 (2007); *Lee v. City of Los Angeles*, 250  
 3 F.3d 668, 679 (9th Cir. 2001). The Court does not, however, "accept  
 4 as true allegations that are merely conclusory, unwarranted deductions  
 5 of fact, or unreasonable inferences." *See Sprewell v. Golden State*  
 6 *Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001), *amended on other*  
 7 *grounds by* 275 F.3d 1187 (2001). Because Plaintiff is proceeding *pro*  
 8 *se*, the Court construes the pleadings liberally. *See Barrett v.*  
 9 *Belleque*, 544 F.3d 1060, 1061-62 (9th Cir. 2008) (*per curiam*).

10 B. Plaintiff's Unlawful Arrest, Conspiracy, and Perjury Claims  
 11 are Heck Barred

12 The gist of Plaintiff's suit is that his arrest by Newport Beach  
 13 police was unlawful and, therefore, the DNA evidence that they  
 14 obtained as a result of that arrest was obtained illegally. He  
 15 contends that when he tried to expose these facts in his criminal case  
 16 in Arizona, Newport Beach Police Department personnel lied about what  
 17 had happened.

18 Defendants argue that Plaintiff's claims are barred under *Heck v.*  
 19 *Humphrey*, 512 U.S. 477 (1994), because a decision in his favor would  
 20 necessarily call into question his criminal conviction in Arizona.  
 21 (Doc. No. 17 at 20-21.) For the reasons set forth below, the Court  
 22 agrees.<sup>4</sup>

23 A defendant who is convicted in a criminal case is barred from  
 24 bringing a civil rights action under § 1983 if a decision in his favor  
 25 "would necessarily imply the invalidity of his conviction or

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26  
 27 <sup>4</sup> Plaintiff concedes in his Objections to the initial Report and  
 28 Recommendation that these claims are *Heck* barred. (Doc. No. 76 at 2.)

1 sentence." *Heck*, 512 U.S. at 487. That is exactly what Plaintiff is  
2 attempting to do here. He is trying to prove that his arrest by  
3 Newport Beach police was unlawful and, consequently, the DNA evidence  
4 obtained following his arrest was obtained unlawfully and should have  
5 been excluded from his criminal trial in Arizona. In fact, prior to  
6 his criminal trial, Plaintiff argued in the state court in Arizona  
7 that his arrest was unlawful, that the Newport Beach Police Officers  
8 falsified their reports, and that they conspired to conceal their  
9 unconstitutional acts by lying about what they had done. (See Doc.  
10 No. 69-5 at 4-9, 22; Doc. No. 69-6 at 4-12; and Doc. No. 69-7 at 4-5.)  
11 The judge in Arizona held three hearings to address Plaintiff's  
12 motions to suppress the DNA evidence obtained by the Newport Beach  
13 police following his arrest. Ultimately, the judge denied Plaintiff's  
14 motions to suppress and ruled that Plaintiff's arrest was lawful and  
15 that a California statute that authorized police to take his DNA was  
16 constitutional. (Doc. No. 69-6 at 7-8.) Plaintiff was subsequently  
17 convicted of multiple counts of sexual assault, sexual abuse,  
18 burglary, kidnaping, and aggravated assault. (Doc. No. 65, Exh. H.)

19 Plaintiff cannot collaterally attack those convictions by  
20 challenging the legality of the police officers' collection of his DNA  
21 because his convictions have never been called into question. See  
22 *Guerrero v. Gates*, 442 F.3d 697, 703-04 (9th Cir. 2003) (holding  
23 claims alleging wrongful arrest, malicious prosecution, and conspiracy  
24 would necessarily imply the invalidity of a criminal conviction if the  
25 plaintiff were successful and, therefore, are barred under *Heck*).

26 Plaintiff notes that his convictions are on appeal and seems to  
27 suggest that that is enough to call into question the validity of  
28 those convictions. (Doc. No. 67, Plaintiff's Response to the Court's

1 Request for Supporting Documents at 2.) Plaintiff is mistaken. An  
2 appeal is not evidence that a conviction has been called into  
3 question. Rather, it is evidence that a defendant has alleged that  
4 his conviction was improper. Because the convictions are still valid,  
5 Plaintiff's unlawful arrest, conspiracy, and perjury claims are barred  
6 unless and until he is successful in his appeal.<sup>5</sup>

7 C. Plaintiff's Claims Under the Fifth and Sixth Amendments Fail

8 Plaintiff claims that Defendants violated his Fifth and Sixth  
9 Amendment rights. (FAC at 31.) The Fifth Amendment applies "only to  
10 actions of the federal government--not to those of state or local  
11 governments." *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir.  
12 2001). Thus, Plaintiff's Fifth Amendment claims against the police  
13 are dismissed with prejudice. *See Kuder v. Haas*, 2010 WL 4983455, at  
14 \*6 (E.D. Cal. Dec. 2, 2010) (dismissing with prejudice Fifth Amendment  
15 cause of action because defendant was not a federal actor and  
16 plaintiff could not fix that by amendment of the complaint). As to  
17 his Sixth Amendment claims, Plaintiff does not explain the basis for  
18 them or even explain what they are about. Thus, they, too, are  
19 dismissed.<sup>6</sup>

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21 <sup>5</sup> Plaintiff's *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658  
22 (1978) claim against the City of Newport Beach, which is grounded in  
23 his claim that the police covered up his illegal arrest, is also *Heck*

24 <sup>6</sup> In his Objections, Plaintiff raises new arguments, i.e., that  
25 federal agents were somehow involved in his case. (Doc. No. 76 at 3.)  
26 To the extent that Plaintiff is trying to amend the FAC through his  
27 Objections, he cannot do that. Plaintiff did not sue any federal  
28 agents nor did he allege in the FAC that federal agents played any  
role in Plaintiff's arrest or prosecution. Further, assuming federal  
agents were involved in assisting Defendant police officers in  
Plaintiff's prosecution, any claims against them would also be *Heck*

#### D. Excessive Force

Plaintiff contends that police used excessive force when they arrested him. (FAC at 3, 6, 8.) Defendants disagree. They argue in their Objections that Plaintiff has not stated enough facts to support an excessive force claim. This objection is overruled. Plaintiff claims that Officer Gamble jumped on his back while he was lying on the ground and pepper sprayed him for no reason. (FAC at 6, 8.) He also alleges that Defendant Zeeman jumped on his back while he was lying on the ground. (FAC at 6.) This is enough to state an excessive force claim.

Defendants note that Plaintiff attached Gamble's declaration to the FAC and argue that the Court should consider her declaration in deciding their motion to dismiss. In the declaration, Gamble avers that she was not there when Plaintiff was arrested. The Court will not rely on this declaration in deciding the motion to dismiss because it contradicts what Plaintiff has alleged in the FAC itself and in his papers opposing the motion.

### III.

## RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Final Report and Recommendation;

barred because Plaintiff's success on them in this court would undermine his conviction in Arizona. Plaintiff also seeks to bring a claim under the Sixth Amendment, arguing that the Arizona court violated his Confrontation Clause rights when it failed to require Officer Gamble to appear in person to testify at a pretrial hearing. (Doc. No. 76 at 4-5.) This claim amounts to nothing more than a collateral attack on his conviction. Thus, it is *Heck* barred. Further, it should be raised in a habeas petition in Arizona, not a civil rights suit in California.



1 (2) denying Defendants' motion to dismiss Plaintiff's excessive force  
2 claims; and (3) granting Defendants' motion to dismiss the remainder  
3 of Plaintiff's claims without prejudice to renew should Plaintiff's  
4 conviction be overturned.

5 DATED: January 31, 2017

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PATRICK J. WALSH  
UNITED STATES MAGISTRATE JUDGE